> The threat to open-mindedness at which the partisan activities and solicitation clauses aim comes not from within the candidates, but from without and consists of the candidates placing themselves in debt to powerful and wide-reaching political organizations that can make or break them in each election. This is a fundamental distinction between the partisan activities and solicitation clauses, on the one hand, and the announce clause, which was at issue in *White*.

Republican Party of Minnesota v. White, 416 F.3d at 768 (Gibson, J., dissenting).

In striking down the partisan-activities clause, the Eighth Circuit employed a rather mechanical, and wholly inappropriate, application of *White's* underinclusiveness analysis. The Eighth Circuit first failed to specifically address the interest addressed by the partisan-activities clause, instead simply adopting the "open mindedness" inquiry articulated in *White*. But certainly the political activities provisions are not designed to address judicial open-mindedness in all of its aspects. The pledges or promises clause addresses threats to judicial open-mindedness that arise from campaign statements that promise or appear to promise how a judicial candidate will decide a case or class of cases. The solicitation clause addresses threats to judicial open-mindedness that arise from the influence of money. The partisan-activities clause, on the other hand, addresses outside pressures on an independent and impartial judiciary that can arise from the realities of partisan politics.[4]

Properly defined, the partisan-activities clause can hardly be viewed as underinclusive, as its reach is limited to the threat to open-mindedness or true judicial independence that can only arise when an individual becomes indebted to a party that can play the role of judge-maker. The evil sought

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[4] The failure to address all of the Canons together is part of the Eighth Circuit's misstep. Read in isolation from other provisions, it is not surprising that one provision may be underinclusive and fail to address the entire problem however stated.

to be addressed, indebtedness and allegiance and the appearance of that indebtedness and allegiance, primarily arises in the context of a campaign and that ever present next election cycle looming on the horizon.

White found that the announce clause was temporally underinclusive because it only applied to announcing views during the campaign. Under the announce clause, judges were permitted to announce their views whenever they wrote an opinion, and nonjudge candidates were permitted to announce their views at any time before or after the campaign. *White* therefore found that the real purpose of the announce clause was to stifle campaign speech.

In contrast, the partisan-activities clause applies to judges at all times, a fact that is not even mentioned in the Eighth Circuit opinion. In fact, the partisan-activities clause is only an aspect of a more general prohibition on political activities by judges that is found in the federal system as well as many states. The question presented is whether, in a nonpartisan election system, this restriction may be extended to nonjudge candidates as well as to judges.

The answer must be yes. First, an election in which the challenger conducts a partisan campaign will be a partisan election even if the incumbent refrains from partisan activity. Second, the partisan associations of a nonjudge candidate will conflict with her role as judge if she is elected, in the same manner that partisan associations of the incumbent judge would conflict if the latter is re-elected. Third, unlike announcing views, partisan affiliation is unnecessary to a robust election. A candidate does not need partisan ties to announce his views on disputed legal and political issues. To the extent that the Eighth Circuit is correct that announcement of partisan affiliation is merely an implied announcement of views, a candidate can easily avoid the impact of the partisan restrictions by announcing those views directly.

It is true that the partisan activities provisions do not prohibit candidates with partisan backgrounds from seeking judicial office. But that is a feature of every judicial selection system, including the federal model. The assumption is that a candidate with a partisan past can meaningfully put that

past behind him when he is sworn in as judge, and serve as judge free from partisan influence. History has shown this assumption is true, as there are a great many judges who have divorced themselves from partisan backgrounds to make enormous contributions on the bench, contributions that would be lost if their partisan backgrounds had rendered them ineligible for judicial office.[5] In a nonpartisan election system, however, the prohibition on partisanship becomes effective not when the judge is sworn in but when the lawyer becomes a candidate. Otherwise the prohibition will be ineffective.

Apart from incorrectly asserting that temporal underinclusiveness belied the stated purpose for the provision, the Eighth Circuit also went on to opine that the interest in judicial open-mindedness could not in any event ever be a sufficiently compelling interest to justify an abridgement of core First Amendment rights. The basis for this conclusion was nothing more than the continued assertion that the partisan-activities clause was underinclusive. The Eighth Circuit turned the underinclusiveness inquiry on its head.

The underinclusiveness of a measure may well be evidence that the proffered concerns may not have truly motivated the state and may cast doubt on how compelling the interest really is. But the underinclusiveness of a measure does not directly dictate that the interests are therefore automatically not compelling.

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[5] The Eighth Circuit characterized the Minnesota judiciary as "patronage-propounded selectees." *Republican Party of Minnesota v. White*, 416 F.3d at 753 n.11. Apart from its mistaken assumptions about judicial selections in Minnesota, this statement illustrates a failure to understand the essential similarities in the role of judges regardless of the courts in which they serve. Judges in some states and in the federal system are appointed by a partisan office holder. A dismissal of the importance of judicial independence cannot be compartmentalized to the state judiciary. If judicial independence is not a sufficiently important value to justify restrictions on partisan affiliation, it becomes difficult to assert it as a value sufficient to defend against the numerous other ways in which the independence of the state and federal judiciary is under attack.

The Eighth Circuit found that the Minnesota provisions were underinclusive because judicial candidates were not prohibited from speaking at, or obtaining the endorsement of, other organizations such as the NRA, NAACP, NOW, AFL-CIO, and other politically active organizations, and therefore Minnesota had left appreciable damage to the supposed vital state interest. The Eighth Circuit's assertion is somewhat surprising. Quite to the contrary, Minnesota has not left appreciable damage to that interest (even assuming the interest is limited to judicial open-mindedness as articulated by the court). Until *White*, announcing one's views to political interest groups could run afoul of the announce clause contained in Minnesota's Code of Judicial Conduct and certainly implicitly pledging results in office to such political interests groups would run afoul of the pledges and promises clause. Most importantly, however, the Eighth Circuit's reasoning fails to recognize that the partisan-activities clause is not aimed at a candidate's announcing views by association, but rather the direct influence that is inherent in partisan activities.

In *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), this Court expressly recognized the danger partisan activities could pose to fair and effective government. Importantly, the Court in *Letter Carriers* noted that restrictions on partisan activities were not necessarily aimed at particular views or parties or groups with such views. Rather, the restrictions were aimed at ensuring that public servants performed their jobs "without bias or favoritism for or against any political party or group or the members thereof." 413 U.S. at 565. The interest at stake was not defined in terms of having public servants that did not have *any* bias on matters that might impact their support for the laws or programs they were charged with carrying into effect.[6] Rather, the interest under review

[6] The Eighth Circuit ruminates over the fact Canon 5 does not apply to political action organizations like the NRA. But certainly a restriction on federal employees participating in such groups would not be valid under the reasoning of *United States Civil Service Comm'n v. National*

(Continued on following page)

was limited to the peculiar influence of partisan politics and the appearance of that influence. *Id.* ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.")[7]

One might assert that, unlike the interests that others may have in enlisting public employees to join the party fight, the interest voters may have in receiving information on party endorsement distinguishes this case from *Letter Carriers*. But that argument would call into question the legitimacy of nonpartisan elections entirely. Given that a judicial candidate is free to announce his views on any platform of issues, the restrictions contained in Canon 5 do no more than prohibit the candidate from placing himself under the influence of a controlling party. The provisions are not aimed at any expression at all, but rather the reality of partisan influence and its appearance.[8] Examined in a realistic light, the extent and nature of any impact on voters is negligible. Certainly the interests of any single potential voter in receiving such limited information is no greater than a public employee's right to engage in a broad range of

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Ass'n of Letter Carriers, because the harm being addressed is more narrow and focused.

[7] "[W]idely available and publicized evidence substantiates the fear that the majority of the public believes that partisanship does influence the decisions of state courts." *Republican Party of Minnesota v. White*, 416 F.3d 738, 774 (Gibson, J., dissenting). Recusal is not a practical means of addressing this evil as the resulting search for a neutral judge ultimately further damages the credibility and integrity of the judiciary. *See, e.g.*, Ralph Blumenthal, *Delay Case Turns Spotlight on Texas Judicial System*, N.Y. Times, November 8, 2005.

[8] And it is not just partisan influence alone that is at stake, it is also those that work through a party to gain influence. For "whether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 452 (2001).

partisan activities. *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548.

Because of the peculiar influence, or appearance of influence partisan politics brings to bear on office-holders, the line drawn by Minnesota hardly results in arbitrary underinclusiveness, but rather is a measured response to address a most acute threat to judicial independence, integrity, and impartiality.[9] It is a complete misreading of this Court's discussion on underinclusiveness in *White*, as well as completely without logic, to conclude that Minnesota's interest in judicial independence, integrity and impartiality is stripped of significance simply because Canon 5 alone does not go far enough to preserve these interests in all conceivable respects.

C. The Eighth Circuit misapplied *White* to the solicitation clause.

The Eighth Circuit addressed the solicitation clause with the same broad interests outlined in *White*. Thus, the Eighth Circuit posed the question as whether the solicitation clause served the interest of preventing bias against a party and a general interest in judicial open-mindedness on legal issues. The Eighth Circuit again failed to appreciate the precise issue that the provisions seeks to address – the influence of money and its appearance.

At the outset, the Eighth Circuit addressed the issue without any consideration of its decision on the partisan-activities clause and what impact this would have on its consideration of the solicitation provisions. The Eighth Circuit stressed that under Canon 5, the contributions go to a committee and the committee was prohibited from disclosing who contributed and those who rebuffed solicitation. But

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[9] And apart from the inherent and logical differences between political parties and special interests groups, the Eighth Circuit had scant evidence to support its implicit assertion that special interest groups have an ability to produce obligated office holders comparable to political parties.

with a candidate fully able to seek, obtain and use party endorsements, it will come as no surprise to anyone from where some, if not the lion's share, of the monies derive. It is also somewhat naive to think that a candidate does not expect that much of the funds he raises are from the very people to whom he makes a request. In addressing large groups for donations, it seems a simple proposition – candidates do not ask people that are disinclined to give.[10]

In addition, with the ability to announce one's views on disputed legal issues that may come before the very court the candidate seeks, the specter of campaign pandering arises. Of course, other elected office holders quite often ask for contributions from groups while pandering to the views espoused by the group. But the reality is that with judicial elections, the primary contributors are often the very lawyers and law firms that appear before the court. Announcing one's views on the constitutionality of tort reform measures under state law may do little to impact the integrity, impartiality and independence of the candidate in isolation, but the same comments to members of the plaintiffs' bar while asking for a campaign contribution most certainly erodes public confidence in judicial integrity, impartiality, and independence.

The corrosive effects of asking for campaign contributions in this setting is certainly no less than when a candidate receives a "large" campaign contribution. Quite apart from any improper motivations on the part of the judicial candidate, "the appearance of improper influence 'is also critical . . . if confidence in the [judiciary] is not to be eroded to a disastrous extent.'" *Buckley v. Valeo*, 424 U.S. 1, 27

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[10] And aside from the real appearance of impropriety, "any candidate can flank the campaign committee's confidentiality obligation simply by looking up public records showing who contributed to whom." *Republican Party of Minnesota v. White*, 416 F.3d 738, 786 (Gibson, J., dissenting). And the only purpose served by an individually signed letter is to impress upon the recipient the idea that the candidate himself had personally made the request.

(1976) (quoting *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. at 565).

II. Strict In Theory Or Fatal In Fact – The Decision Below Ignores That States Must Be Accorded Some Deference In Strict Scrutiny Cases When Balancing Interests Of Constitutional Magnitude.

In its decision, the Eighth Circuit employed a brand of strict scrutiny that simply could never be met. First, the Eighth Circuit concluded that underinclusiveness of any appreciable degree negated the state's interest as compelling. Next, the Eighth Circuit required any provision at issue to be narrowly tailored to the point of unattainable precision.

However, this Court has repeatedly rejected the notion of a strict scrutiny standard that is strict in theory but always fatal in fact. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). The Court simply does not impose "judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems." *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996).

Reasoned strict scrutiny analysis is especially important where "a law significantly implicates competing constitutionally protected interests in complex ways." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring). There must be room for line drawing and decisions to tackle "the problem which seems most acute to the legislative mind." *McConnell v. Fed. Election Comm'n*, 540 U.S. at 208.

Some deference in the assessment of the harm and where it is most acute is essential. Courts have no inherent better handle on the extent to which litigants' perceptions of unfairness or corruption develop from partisan activities or direct solicitation for money than legislative bodies. But certainly there is nothing novel or implausible in the judgment that such practices do pose a serious threat to public confidence in the judiciary. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402. And this Court's review is no less exacting

by simply taking into account these judgments that motivated the provisions at issue. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003).

One of the primary justifications for the restrictions at issue is the state's interest and indeed obligation in guaranteeing due process for its citizens and the citizens of sister states that are subject to the judicial power of that state. Of course, due process requires a judge to be impartial, in the sense that he may not have a personal stake in the outcome. But the concept of due process must also resolve, on principal, who must bear the risk of unavoidable uncertainty. *See generally Peters v. Kiff*, 407 U.S. 493 (1972). "As a practical matter, we cannot know for sure whether an elected judge's decisions are based on his interpretation of the law or political expediency." *White*, 536 U.S. at 800 (Stevens, J., dissenting). States must have some latitude in addressing uncertainty, where the uncertainty implicates the very fairness of judicial proceedings. The Eighth Circuit's opinion does not explain why the constitutional scale requires a litigant to bear the risk of uncertainty, or more importantly why the state's judgment that partisan activities and direct solicitations create an intolerable level of uncertainty, is not entitled to some deference, particularly where the state is quite clearly balancing competing constitutional values.

Justice O'Connor in her concurring opinion in *White* stressed that the very practice of electing judges undermines to some extent the state's interest in actual and perceived impartiality. If elections themselves undermine this interest, it is certainly not difficult to see how partisan elections, with all of the partisan activities that go along with such elections, undermines this interest even more directly and substantially. If the practice of electing judges is not violative of due process (and it is not) then the states remain free to walk this tightrope. And in doing so, some deference must be accorded to these judgments.

The unstated proposition underlying the Eighth Circuit decision, in so far as its application of the strict scrutiny test could simply never be met, is that a state is prohibited from taking prophylactic measures designed to ensure that the

state is meeting its obligations of due process. Applying a strict scrutiny test that is more strict in theory but fatal in fact, the only permissible measures apparently would be those that are strictly required by due process. But that has never been the state of the law on First Amendment jurisprudence. *See, e.g.*, *Cox v. Louisiana*, 379 U.S. 559 (1965).

III. A State's Ability To Ensure An Independent Judiciary Is Necessary To Maintain Any True Separation Of Powers, An Independent And Compelling Governmental Interest Ignored By The Eighth Circuit.

White criticized the failure to clearly define the state interests served by the announce clause. But when the partisan-activities clause came before the Minnesota Supreme Court, the court specifically defined the interests served by the clause. The court stated that the clause not only served a state interest in judicial impartiality but also a distinct interest in judicial independence recognized in *Peterson v. Stafford*, 490 N.W.2d 418 (Minn. 1992) and related to the provision for separation of powers in the Minnesota Constitution:

> [T]he separation of powers inherent in the creation of three distinct branches of government, one of which is the judicial branch, in article III, section 1 of the Minnesota Constitution provides the constitutional underpinning for the independence of the Minnesota judiciary. As the executive and legislative branches are inextricably intertwined with partisan politics, maintenance of an independent judicial branch is reliant on the freedom of its officials from the control of partisan politics.

In re Amendment of the Code of Judicial Conduct, No. C4-85-697, slip op. at 1 (Minn. Sept. 14, 2004). The Eighth Circuit showed little understanding of this state interest. *See Republican Party of Minnesota v. White*, 416 F.3d at 752 n.7.

"Elected officials in some sense serve two masters: the constituents who elected them and the political sponsors who support them." *Vieth v. Jubelirer*, 541 U.S. 267, 332 (2004) (Stevens, J., dissenting). But "the judge represents the Law – which often requires him to rule against the People." *Chisom v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting.) For it is the courts' duty to "make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980). In fact, the very "legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). "Judicial integrity is, in consequence, a state interest of the highest order." *White*, 536 U.S. at 793 (Kennedy, J., concurring).

Impartiality, integrity and independence are terms that imply related concepts. But in the context of discerning whether there is a compelling state interest that justifies some limited curtailment of partisan and political activities in elections for judicial office, they must be looked at separately.[11] Judicial independence, in this sense, means

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[11] "In *White*, remember, the Court did not consider Minnesota's interest in preserving judicial independence because the parties had used the terms "independence" and "impartiality" to mean the same thing. They do not. Whereas the interest in impartiality is rooted in the due process rights of litigants, the interest in judicial independence is rooted in the principle of separation of powers. Although judicial independence may promote impartiality, that is not its only function. Independence also is the foundation of the power of judicial review, which enables the judiciary effectively to check the political branches through the process of judicial review. The independence required to guarantee due process to litigants is not coextensive with that required to pass on the constitutionality of political acts. In addition, independence enables the judiciary to promote the rule of law instead of rule by men and women. While this form of independence is essential to due process in that it seeks to ensure that the law will be applied in an evenhanded manner, it also serves a broader goal of upholding long-term commitments embodied in the law, a goal not necessarily related to a judge's impartiality toward the litigants before her." W. Weiser, *Regulating Judges' Political Activity After* White, 68 Alb. L. Rev. 651, 666-667 (2005) (footnotes omitted).

that separation from the responsive branches of government that is necessary to properly carry out the power of judicial review.

In *White*, Justice Scalia, writing for the majority, noted that the "role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *White*, 536 U.S. at 781-782 (quoting *Wood v. Georgia*, 370 U.S. 375, 395 (1962)). But here, the role of the position is defined by the sovereign as being a check on the political branches – a countermajoritarian force that simply cannot co-exist peacefully with partisanship. In fact, contrary to the dicta in *White*, the move towards judicial elections was not motivated by an attempt to diminish the independence of the judiciary but rather just the opposite – an attempt to free the judiciary from the entanglements of partisanship. R. Schotland, *To The Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 Willamette L. Rev. 1397, 1400 (2003); W. Weiser, *Regulating Judges' Political Activity After* White, 68 Alb. L. Rev. 651 (2005).

As the Eighth Circuit remarked, party affiliation plays a role in judicial selection even in an appointive process. *Republican Party of Minnesota v. White*, 416 F.3d at 760 n.11. And it of course would be naive to think that at least some public perception of party loyalty remains, even where the candidate is appointed for life. But a check on this appointment power by a partisan office holder is exactly the purpose Minnesota has strived for in having judicial elections.

The structure and purpose of an election is established by the sovereign. Under the so-called Missouri plan, for example, the issue to be decided is solely one of retention. Is a state's interest in keeping the office holder from engaging in partisan activities under this framework any different? Attempts at distinguishing the office holder's role as judge from candidate would clearly be untenable.

Judges are restricted in many ways while they are state actors and in ways that are more burdensome than with other office holders. *See Clements v. Fashing*, 457 U.S. 957 (1982). This is not mere balancing, *Connick v. Myers*,

461 U.S. 138 (1983), it the very definition of the position and goes to the very heart of how a sovereign has organized its government.

The Eighth Circuit failed to appreciate that partisan prohibitions apply to judges as well as non-judge candidates. In doing so, the Eighth Circuit made a crucial error; it failed to review the campaign in the context of the judicial role. The role of the judiciary as dictated by the citizens of Minnesota is one of substantial independence from the political branches of government. Under the guise of protecting Minnesota citizens' right to robust elections, the Eighth Circuit has shown a profound disrespect for the ability of a state to ensure that its citizens will have access to independent and impartial courts.[12] Through its decision, the Eighth Circuit has eviscerated the ability of Minnesota and other states to structure their government in a manner that they see fit.

CONCLUSION

At a critical time for the courts, the Eighth Circuit decision has created enormous uncertainty and confusion about the extent to which states may protect their courts from the influences of politics and money. The stakes are too high to permit delay in resolving these questions. As Justice O'Connor remarked: "Judicial independence doesn't happen all by itself, it's tremendously hard to create, and easier than most people imagine to destroy." O'Connor, remarks at University of Florida Levin College of Law (September 9, 2005) (transcript available at http://www.law.ufl.edu/dedication/speechtext.shtml). This Court's immediate review is needed. The petition for writ of certiorari should be granted.

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[12] Illustrating its misunderstanding of State sovereignty, separation of powers, and Minnesota law, the Eighth Circuit questioned the Minnesota Supreme Court's authority to adopt the Code of Judicial Conduct. *Republican Party of Minnesota v. White*, 416 F.3d at 753 n.17.

Respectfully submitted,

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